INTERIOR BOARD OF INDIAN APPEALS

Sanford W. Smith v. Acting Muskogee Area Director, Bureau of Indian Affairs

30 IBIA 104 (11/26/1996)

Earlier judicial case:

Dismissed for failure to exhaust administrative remedies, *Smith v. United States*, No. CIV 95-385-P (E.D. Okla. July 17, 1996)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

SANFORD W. SMITH
v.
ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-164-A Decided November 26, 1996

Appeal from a decision concerning payment of attorney fees from the estate of a fullblood Creek Indian.

Affirmed.

1. Indian Probate: Attorneys at Law: Fees--Indians: Financial Matters: Individual Indian Money Accounts

   Under a longstanding Departmental interpretation of the Act ofAug. 4, 1947, 61 Stat. 731, the Bureau of Indian Affairs has discretionary authority over payment of attorney fees from the restricted funds of deceased Indians of the Five Civilized Tribes when the attorney fees are generated during probate of the estatesof those Indians in Oklahoma State courts.

2. Administrative Procedure: Burden of Proof--Statutory Construction: Indians

   Where an appellant before the Board of Indian Appeals seeks to overturn a longstanding Departmental interpretation of a statute, he/she bears the burden of proving error in that interpretation.

APPEARANCES: Appellant, pro se and through D. D. Hayes, Esq., Muskogee, Oklahoma; Charles R. Babst, Jr., Esq., Office of the Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Acting Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Sanford W. Smith seeks review of an August 11, 1995, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the payment of attorney fees from the estate of Eastman Richard, Jr. (decedent), a fullblood Creek Indian. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Decedent died on December 16, 1993. In accordance with section 3 of the Act of Aug. 4, 1947, 61 Stat. 731 (1947 Act), his estate was probated in Muskogee County District Court, a court of the State of Oklahoma. In re Estate of Eastman Richard, Jr., No. P-94-17 (Dist. Ct. Muskogee County, Okla.) Appellant represented decedent's wife, Radene Richard, both prior and subsequent to her appointment as administratrix of decedent's estate.

During the course of the probate proceedings, the Oklahoma court approved two partial payments of attorney fees to appellant, in the amounts of $8,500.00 and $5,000.00, with payment to be made from decedent's estate. Charles R. Babst, Jr., serving as the Solicitor's Office Trial Attorney, 1/ objected to the partial payments on both occasions but was overruled. See the Oklahoma court's orders of Sept. 27, 1994, and May 1, 1995. BIA made payment of the amounts approved in these orders.

On June 23, 1995, the Oklahoma court issued a final order in the probate. In that order, the court approved a further attorney fee payment to appellant in the amount of $5,445.65, again over the objection of Mr. Babst.

On July 25, 1995, the Area Director wrote to appellant, stating:

> [R]estricted funds of Indians of the Five Civilized Tribes are held in restricted status by [BIA] pursuant to Section 5 of the [1947 Act], and the Department of the Interior is obligated to closely scrutinize payment of attorney fees from such funds.
>
> Based upon the Department's review of the case file, your time sheets, and the facts and circumstances of the case, we currently believe that $15,000 should be the maximum amount paid from restricted funds in this matter. If this is agreeable to you, please advise the Branch of Finance/IIM so that we may commence with the distribution of assets. If not, please provide us with your comments for your [sic, probably should be "our"] consideration. In the event we have not heard from you in 10 days, we will issue a decision in this regard.

Appellant did not respond. On August 11, 1995, the Area Director issued a decision, in which he stated:

> Section 5 of the [1947 Act] provides that:
>
> > " . . . all funds and securities now held, or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging

1/ See discussion infra concerning the role of Solicitor's Office attorneys in Five Civilized Tribes probates.

> to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until otherwise provided by Congress, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe."

Further, the Code of Federal Regulations (C.F.R.), at 25 C.F.R. Sec. 115.12, provides that "funds of a deceased Indian of the Five Civilized Tribes may be disbursed to pay . . . costs of determining heirs to restricted property . . .." Accordingly, [BIA] has the authority to make a discretionary determination of the reasonableness of attorney fee awards pertaining to estates of Indians of the Five Civilized Tribes. * * *.

* * * * * *

According to your billing statement, Ms. Richard had previously retained you as her personal counsel in this matter prior to her appointment as the decedent's personal representative. In our view, these fees would more appropriately be paid by Ms. Richard in her personal capacity. According to your billing statement, you expended 20.25 hours on behalf of Ms. Richard prior to your appearance at the February 15, 1994, hearing. This time multiplied by your $125.00 per hour rate equals $2,531.25.

Your billing statement reflects that on May 9 and June 23, 1994, you expended 5.5 hours driving Ms. Richard to Okmulgee to fill out forms and sign papers. We estimate driving time from Muskogee to Okmulgee to be forty-five minutes to one (1) hour; therefore, from three (3) to four (4) hours of your billing time was spent driving. We do not believe that $125.00 per hour is a reasonable expense for essentially chauffeuring Ms. Richard to and from Okmulgee. Accordingly, we are willing to allow three (3) hours at $125.00 per hour for these two trips for a savings to the restricted estate of $312.50.

Your billing statement also indicates that 30 minutes was spent preparing a Subpoena Ducas Tecum attempting to compel a deposition of the Superintendent, Okmulgee Agency, [BIA]. Your hourly rate of $125.00 divided in half equals $62.50. $62.50 plus the cost of the subpoena of $49.50 equals total cost of $112.00. We are advised that Muskogee attorney Mark Green was involved in the preparation and discussions involving this subpoena and we do not believe that the subpoena was intended to further the administration of the subject estate. Accordingly, we do not believe that it is appropriate for the restricted estate to bear the costs of the subpoena.

> Further, a review of the case file does not reveal that you were involved in any will contest, or that you addressed complex legal or tax issues. Several of the orders on hearing that were filed in the case were prepared by other private attorneys who were retained by other heirs to the estate. The record does not reflect that there were complex issues regarding the payment of bills by the estate.
>
> Finally, your billing statement shows that a considerable amount of time was spent "conferring" in person or on the telephone with other attorneys in the case. Neither your billing statement nor the record reflects that you researched or briefed complex probate issues, and we do not believe that the fact that the decedent accumulated a large sum of money during his lifetime entitles an attorney to inflate the value of his services to the restricted Indian estate. Accordingly, we have determined that $15,000.00 is the maximum amount that should be paid from restricted funds in this case. [Emphasis in quotation of 25 C.F.R. 115.12 added by the Area Director.]

(Area Director's Aug. 11, 1995, Decision at 1-3).

Appellant appealed this decision to the Board in accordance with the instructions in the Area Director's decision. However, before filing his notice of appeal with the Board, appellant filed suit in Federal district court, seeking to compel payment of attorney fees in the full amount approved by the Oklahoma court, i.e., $18,945.65.

On July 17, 1996, appellant's Federal court case was dismissed without prejudice to allow completion of this administrative appeal. Smith v. United States, No. CIV 95-385-P (E.D. Ok. July 17, 1996). On August 9, 1996, appellant filed a notice of appeal from the dismissal. The Board has no further information about proceedings in that appeal but assumes that the appeal is now pending before the United States Court of Appeals for the Tenth Circuit.

Discussion and Conclusions

In his opening brief, appellant states:

> The questions presented herein for the determination of this Court are:
>
> 1. Jurisdiction - the interpretation of [the 1947 Act], Section 3 (a) and (b) as opposed to Section 5 of said Act, * * *.
>
> 2. Whether the failure of [the Area Director] to exhaust [his] remedy of appeal through the Court system of the State of Oklahoma precluded [his] right to make a decision in this matter and, therefore, the necessity of Appellant's appeal herein.

> 3. Whether [the Area Director] had sufficient ability, training and experience to make a decision in this matter and, if so or if not, did his ability, training, and experience outweigh that of Messrs. Edmiston, Hilfiger and Haworth, the employed attorneys of the Indian heirs, as well as that of the presiding Judge, Edmondson.

(Appellant's Opening Brief at 1-2 (unnumbered)).

The Board addresses these questions in the order appellant presents them. With regard to his first issue, appellant's argument is cryptic. 2/ It appears possible that he is attempting to argue that, because section 3 of the 1947 Act vests exclusive jurisdiction over Five Civilized Tribes probate matters in the Oklahoma courts, the Area Director is precluded from exercising his authority under section 5 of the Act, at least insofar as attorney fees for these probate matters are concerned.

Section 3 of the 1947 Act provides in relevant part:

> (a) The State courts of Oklahoma shall have exclusive jurisdiction of all guardianship matters affecting Indians of the Five Civilized Tribes, of all proceedings to administer estates or to probate the wills of deceased Indians of the Five Civilized Tribes, and of all actions to determine heirs arising under section 1 of the Act of June 14, 1918 (40 Stat. 606).

2/ The section of appellant's brief entitled "Argument" states in its entirety:

"No argument. Just a request that a qualified legal scholar review this matter in depth before making a determination that the 'federal scheme' and Appellant's [sic, probably should be 'Appellee's'] newly found 'policy' should prevail. However, it would be appreciated if you would be kind enough to advise whether the undersigned will be allowed its [sic] attorney fees and expenses in this matter for representing Appellant if, for any reason, Appellant should prevail in this matter."

(Appellant's Opening Brief at 12 (unnumbered)).

In an earlier section of his brief, entitled "Law Applicable," appellant makes a cursory argument:

"Section 3 (a) and (b) of the [1947 Act] confers exclusive jurisdiction on the State Courts of Oklahoma over the probate matters of deceased Indians of the Five Civilized Tribes of Oklahoma and the probate of the estate of Eastman Richard, Jr., is such a case.

"Said act * * * further provides 'and the final judgment rendered in any such action or proceeding shall bind the United States and the parties thereto to the same extent as though no Indian property or question were involved.'

"The Legislative History of said Act * * * reflects the purpose of Congress in enacting said Section 3 (a) and (b) of the Act * * * was for the unilateral benefit of the Federal Courts." (Id. at 4 (unnumbered)).

> (b) The United States shall not be deemed to be a necessary or indispensable party to any action or proceeding of which the State courts of Oklahoma are given exclusive jurisdiction by the provisions of subsection (a) of this section, and the final judgment rendered in any such action or proceeding shall bind the United States and the parties thereto to the same extent as though no Indian property or question were involved: Provided, That written notice of the pendency of any such action or proceeding shall be served on the Superintendent for the Five Civilized Tribes within ten days of the filing of the first pleading in said action or proceeding.

Appellant and the Area Director appear to agree that section 3 of the 1947 Act was intended to resolve a problem that had arisen under earlier legislation, pursuant to which many probate cases had been removed from Oklahoma courts to Federal court. As indicated above (see the last sentence of footnote 2, supra), appellant contends that section 3 was enacted for the "unilateral benefit of the Federal Courts." Appellant apparently intended this contention to be explained by a document attached to his brief, i.e., an excerpt, consisting of pages 811-12, from a book entitled Oklahoma Indian Land Titles Annotated, 3/ in which the history of the 1947 Act is discussed. The excerpt states that the 1947 Act "was intended to eliminate the transfer to the federal court of all probate matters, and was also intended to limit the transfer of other cases to the federal court." It continues:

> The Act of April 12, 1926, [44 Stat. 239,] was designed by its authors to stabilize Indian titles, but it finally became a vehicle by which the dockets of the federal court were flooded with suits brought in the state courts to quiet title and even suits in the state court involving probate matters. Whether probate matters were promptly transferable, was the subject of litigation for over a period of years, and it was the intention of this act to entirely dispense with the transfer of probate cases to the federal court.

The Area Director, in support of his argument in this regard, quotes from testimony given at hearings on H.R. 3173, 80th Cong., 1st Sess., the bill which became the 1947 Act. This testimony was given by W. F. Semple, described by the Area Director as the author of the 1947 Act. As quoted by the Area Director, Mr. Semple stated:

> In Section 3(a) of the redraft of [H.R. 3173], we . . . are saying by this section that the County Court has original and exclusive jurisdiction of these matters and they are not transferable to the Federal court.

3/ Appellant does not provide a complete citation for the book. However, his excerpt appears to have been taken from W. F. Semple, Oklahoma Indian Land Titles Annotated (1952).

> The necessity for this particular legislation comes about by reason of the fact that there has been a large amount of litigation in late years over the question as to whether or not the County Court has exclusive jurisdiction in that the Federal government cannot transfer a probate case to the Federal courts.
>
> Under the Act of April 12, 1926, which deals with the Five Civilized Tribes titles, there was a provision, Section 3 of that Act, which permitted the transfer to the Federal court of certain causes of action where the lands were restricted Indian lands, or the income from restricted lands were involved, and since that Act has been passed, there have been dozens and dozens of cases in the courts over the question as to whether or not probate matters were in any sense transferrable to the Federal court.
>
> * * * * * *
>
> I think [this section] will rebound to the benefit of everybody and will lighten the Federal government burdens so far as financing these matters are concerned. . . . [Emphasis in Area Director's quotation.]

Stenographic Transcript of Hearings Relative to Restrictions Applicable to Indians of the Five Civilized Tribes of Oklahoma, and for Other Purposes, 1947: Hearings on H.R. 3173 and H.R. 149 Before the Subcomm. on Indian Affairs of the House Comm. on Public Lands, 80th Cong., 1st Sess. 14-15 (1947), as quoted in the Area Director's Brief at 6-7. 4/

Section 5 of the 1947 Act provides:

> That all funds and securities now held by, or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until otherwise provided by Congress, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe.

With respect to section 5, the Area Director provides further testimony from Mr. Semple, who explained that the funds concerned were derived primarily from oil and gas produced from restricted lands. He continued:

> [N]obody wants to disturb the right of the Secretary to continue to administer thos[e] funds under the Department's provisions, the restricted funds in the hands of the Secretary, mean primarily those

4/ The Area Director states that these hearings were not published. The Board's quotation is taken from the Area Director's brief.

> funds from those restricted lands and they have been lodged with the Department under the supervision of the Secretary.

(Stenographic Transcript at 38-39, as quoted in the Area Director's Brief at 5). Mr. Semple's statement reflects an intent which is also apparent from the statutory language itself.

Appellant does not put forth any analysis of section 5 or its purpose. Although he apparently believes that section 3 prevails over section 5, he makes no attempt to explain what, if any, role is played by section 5.

The Area Director understands appellant to be arguing that there is a conflict between section 3 and section 5. The Area Director argues that no conflict exists and that the two sections may easily be read together: "[S]ection 3 gives the state court jurisdiction as the proper forum in which probates and estate administrations of deceased restricted Indians of the Five Civilized Tribes will be heard; section 5 preserves and restates the well-established fiduciary duty of the BIA over individual IIM accounts" (Emphasis in original) (Area Director's Brief at 7).

As noted above, appellant seems to rely on the "exclusive jurisdiction" language in section 3 for his apparent contention that section 5 is inapplicable to attorney fees in Five Civilized Tribes probate cases. Yet, as he recognizes, the problem sought to be solved by the "exclusive jurisdiction" language in section 3 was the problem of removal of probate cases to Federal court, not the exercise by the Secretary of his authority over restricted funds.

In the same statute in which the "exclusive jurisdiction" language appears, Congress vested authority over restricted funds in the Secretary and, significantly, made no exceptions in this authority for attorney fees or other probate costs. The statutory language indicates that Congress neither saw any conflict between section 3 and section 5 nor intended to curtail the Secretary's authority and duty to protect restricted funds in cases where attorney fees are sought.

[1] BIA's present regulation implementing section 5 of the 1947 Act was promulgated in 1958 and now appears at 25 C.F.R. 115.12. It provides: "Funds of a deceased Indian of the Five Civilized Tribes may be disbursed to pay * * * costs of determining heirs to restricted property by the State courts" (Emphasis added). This language indicates that, at least since 1958, the Department has interpreted section 5 as authorizing BIA to exercise discretion in reviewing requests for payment of attorney fees and other probate costs, when payment is sought to be made from restricted funds. Use of the permissive term "may," rather than a mandatory term, evidences this interpretation. Cf. Miller v. Anadarko Area Director, 26 IBIA 97 (1994); Robinson v. Acting Billings Area Director, 20 IBIA 169 (1991); United States v. Acting Aberdeen Area Director, 9 IBIA 151, 89 I.D. 49 (1982), interpreting 5 C.F.R. 115.9, in which the term "may" is also used, and the underlying statute, 25 U.S.C. § 410 (1994), as vesting discretionary authority in BIA. (These cases also establish the principle that the discretion vested in

BIA by the statute and regulations must be exercised in accordance with the trust responsibility of the United States for restricted funds in the custody of BIA.)

In this case, the administrative record includes two examples of the Department's past practice in reviewing requests for payment of attorney fees in Five Civilized Tribes probates. These are two letters, both signed by appellant in his former capacity as Acting Muskogee Field Solicitor, 5/ which show that appellant had reviewed such requests for the purpose of advising the Area Director as to whether payment should be made from restricted funds. 6/

The Area Director contends that appellant's present contentions are inconsistent with the position appellant took in his former capacity as Acting Muskogee Field Solicitor and that, "[a]t the very least, [the 1982 and 1983] letters indicate that BIA has for over a decade taken a consistent position with respect to Departmental review of probate attorney fees requested from restricted funds" (Area Director's Brief at 13).

5/ Appellant states that he was employed by the Solicitor's Office for 14 years. See Appellant's Opening Brief at 8 (unnumbered).

6/ One of the letters, dated Mar. 22, 1982, concerns a request for payment of attorney fees in the amount of $10,000. It states:

"I have reviewed the enclosed summary, as well as our file and the Court file pertaining to this matter, and conclude that the subject probate case could reasonably have been concluded in not more than 60 working hours by you and your office staff. Sixty working hours is less than two-thirds of the number of hours which you are charging for services rendered in this matter.

* * * * * *

"The fact that the subject decedent accumulated a large amount of money during her lifetime does not, in our opinion, entitle an attorney handling the estate the right to inflate the worth of his services to the estate. It would appear that the subject estate, including all pleadings drawn and all court appearances, should be handled in a maximum of 60 hours. It would further appear that $100 per hour for legal services in [redacted] County is more than reasonable in view of the hourly charges by the majority of attorneys in that area.

"It is our opinion that an attorney fee in the amount of $6,000, plus the court costs you have personally expended, should be paid to you for your services in this matter. If this is agreeable with you, please so advise so that we may forward you our check in payment thereof. In the event this is not agreeable to you, please provide this office with a statement of your hourly rate for services so that it, together with your statement of time expended, may be submitted to the Area Director, BIA, with our recommendation for his consideration as to whether your bill should be approved or disapproved."

In the other letter, dated Mar. 25, 1983, appellant advised attorneys, who sought payment of $3,370 in attorney fees, that "[i]n accordance with all criteria necessary under quantum meruit, it would appear that our recommendation on attorney fees be [sic] between $2,750 and $3,000."

Appellant offers no explanation for the discrepancy between his present position and the position he took as an employee of the Solicitor's Office. Nor does he contend that this case may be distinguished in any way from the earlier cases. Although his 1982 and 1983 letters were included in the record, he did not mention them in his opening brief. Even after the matter was discussed in the Area Director's brief, appellant failed to respond to the Area Director's argument. In fact, although he was entitled to do so under Board regulations, appellant did not file a reply brief.

As evidence of BIA's past practice, the 1982 and 1983 letters clearly refute appellant's apparent contention that BIA scrutiny of attorney fees in Five Civilized Tribes probate cases is a "newly found 'policy'" (See appellant's "Argument" quoted in footnote 2, supra). As evidence of appellant's own prior view of BIA's authority under the 1947 Act, expressed when he was employed by the Solicitor's Office, the letters are even more damaging to appellant's case here, particularly in light of his failure to explain the reasons for his change of view.

Appellant fails, in this part of his appeal, to put forth any credible challenge to BIA's longstanding interpretation of the 1947 Act.

Appellant's second argument is that the Area Director was required to exhaust his remedies in the Oklahoma court system before making a decision concerning payment of attorney fees from restricted funds. Appellant admits that the Area Director "was not made a party to the probate of the Estate of [decedent]" (Appellant's Brief at 5 (unnumbered)). Even so, appellant contends, the Area Director should have appealed.

Mr. Babst appeared in the probate proceedings "representing the Secretary of the Interior, for and on behalf of the heirs of [decedent], under the authority provided in Section 4 of [the 1947 Act]" (Notice of Invalidity of Will and Motion of Denial of Will for Probate in Estate of Eastman Richard, Jr., Feb. 1, 1994). 7/ It is not clear from the relevant

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7/ Section 4 of the 1947 Act provides:

"That the attorneys provided for under the Act of May 27, 1908 (35 Stat. 312), are authorized to appear and represent any restricted member of the Five Civilized Tribes in Oklahoma before any of the courts of the State of Oklahoma in any matter in which the said restricted Indian may have an interest."

Section 6 of the Act of May 27, 1908, authorized the Secretary to appoint representatives to, inter alia, advise Five Civilized Tribes allottees of their legal rights and assist them in acquiring and retaining possession of their restricted lands.

See also 25 C.F.R. 16.3, 16.6. Section 16.3 provides:

"The statutory duties of the Secretary to furnish legal advice to any Indian of the Five Civilized Tribes, and to represent such Indian in State courts, in matters affecting a restricted interest owned by such Indian, shall be performed by attorneys on the staff of the Solicitor, under the supervision of the Field Solicitor."

Section 16.6 provides:

statutes and regulations that the Secretary is himself a party to probate proceedings when he, through Solicitor's Office attorneys, appears to represent the heirs. Thus it is not clear that the Secretary could have appealed, as a party, the Oklahoma court's award of attorney fees in this case. Assuming, however, that the attorney fee award in this case was appealable under Oklahoma law, the Secretary, in his capacity as counsel for decedent's heirs, presumably could have filed an appeal on their behalf.

In this appeal, the Area Director contends that the Secretary was not required to exhaust State court remedies because Oklahoma probate law and procedure have been preempted by section 5 of the 1947 Act insofar as the Oklahoma procedures would affect "[t]he preservation and distribution of restricted funds held by the BIA as the fiduciary for restricted Indians of the Five Civilized Tribes" (Area Director's Brief at 11).

The question raised in this part of appellant's appeal is actually the same as that raised in the first part of his appeal))whether authority over the payment of attorney fees from restricted funds of members of the Five Civilized Tribes is vested in the Oklahoma courts or in the Secretary. If that authority rests with the Secretary, he is not bound by a decision of an Oklahoma court on the subject and, accordingly, is not required to appeal the Oklahoma court's decision through the State court system.

Appellant's argument in this part of his appeal is no better articulated than that pertaining to his first issue. Again, he fails to put forth any credible challenge to BIA's interpretation of the 1947 Act.

[2] Appellant was informed in the notice of docketing that the burden was upon him to show error in the Area Director's decision. This is the normal burden an appellant bears before the Board. E.g., Larry Boyer Land & Cattle Co. v. Portland Area Director, 28 IBIA 135 (1995), and cases cited therein; Kays v. Acting Muskogee Area Director, 18 IBIA 431 (1990), and cases cited therein. Here appellant bears, if anything, a heavier burden than usual, because he seeks to overturn, not only the decision on appeal, but a longstanding BIA interpretation of the 1947 Act. The Board finds that appellant has failed to show error in the Area Director's decision insofar as that decision was based upon the premise that the Secretary has discretionary authority over payment of attorney fees in Five Civilized Tribes probates when payment is sought from restricted funds.

Appellant's third argument is that the Area Director, the Area Office staff, and the Solicitor's Office staff are less capable than the Oklahoma judge and the three other private attorneys involved in this probate to determine the appropriate amount of appellant's attorney fees. Appellant

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fn. 7 (continued)

"Attorneys authorized to perform the duties specified in § 16.3 appearing in State court litigation in their official capacities are authorized to take such action as the Secretary could take if he were personally appearing in his official capacity as counsel therein * * *."

bases this contention upon what he alleges to be the career experience of various individuals. He also contends that the three private attorneys all agreed to the payment of appellant's attorney fees in the amount requested by him, and points out that the judge approved the payment.

Even if appellant could prove the contentions he makes about the capabilities of various individuals to assess attorney fees, his contentions would still be irrelevant here. Appellant's task was to prove error in the Area Director's decision. For that purpose, his argument, essentially a series of ad hominem attacks on Departmental staff, is useless.

Appellant appears to make one further argument, which he does not include in his list of issues. Although he does not use the word "estoppel," the thrust of this argument seems to be that the Area Director is estopped from declining to pay the full amount of appellant's attorney fees in this case because, in other cases, he approved payment of attorney fees in the full amount requested.

Under appellant's theory, the Area Director would be precluded from reviewing attorney fee payment requests on a case-by-case basis. Thus, his authority under section 5 of the 1947 Act would be rendered meaningless. For this reason alone, the Board would be required to reject his argument. Further, as the Area Director points out, the Board has held that it will not recognize estoppel against BIA where the claimant seeks payment of money from funds held for Indians in trust or restricted status. Muscogee (Creek) Nation v. Muskogee Area Director, 28 IBIA 24, 32 (1995).

As the Board held above, appellant has failed to show that the Area Director lacked authority to exercise discretion in reviewing his attorney fee payment request. Appellant has also failed to show that the Area Director exercised his discretion improperly. See, e.g., Evans v. Sacramento Area Director, 28 IBIA 124 (1995) (An appellant who challenges a discretionary BIA decision bears the burden of proving that BIA did not properly exercise its discretion).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, the Area Director's August 11, 1995, decision is affirmed. 8/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

8/ Given this disposition, it is not necessary to reach appellant's request for payment of attorney fees in this proceeding.